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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 41

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation, *Petitioners*,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST T. LAUSEN, JR.; ALBERT MORTENSON; COLMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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THE ARGUS PRESS, SEATTLE

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FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of C. E. STEVENS COMPANY, C. E. STEVENS TACOMA COMPANY and C. E. STEVENS COMPANY OF OREGON, respectfully sets forth the following:

SUMMARY STATEMENT OF MATTER INVOLVED

The controlling issue involved in the present case is whether the actions of the respondents, as set forth in the second amended complaint, constitute a re-

straint of commerce in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. (popularly known as the Sherman Act).

This action for treble damages under the Sherman Act was instituted February 27, 1933, in the District Court for the Western District of Washington, Northern Division. Demurrer for want of facts and lack of jurisdiction was submitted and overruled but at the same time certain motions were granted resulting in the filing of an amended complaint. Upon answer thereto and reply, the cause stood at issue awaiting assignment for trial for an extended period during which time the Circuit Court of Appeals for the Ninth Circuit decided *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742.

Thereupon respondents moved for a reconsideration by way of motion to dismiss, which, after hearing, was granted with leave to amend, resulting in the filing of the second amended complaint on March 30, 1938. This was followed by a demurrer upon the part of the respondents which was sustained without leave to amend on the authority of the *Special Site* case, and judgment of dismissal entered on June 8, 1939 (R. 54), from which appeal was taken to the Circuit Court of Appeals for the Ninth Circuit.

On February 19, 1940, the Circuit Court affirmed the judgment of the District Court in an opinion by Judge Wilbur, who wrote the *Special Site* decision, with Judge Healy concurring in the result (R. 8[illegible]). Judge Haney, who had concurred in *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir.) 85 F. (2d) 742, which was the basis of the majority opinion, wrote a

vigorous dissent upholding the sufficiency of the complaint and disapproving the application of the *Special Site* decision to this case (R. 97).

The complaint pleads and the demurrer admits the following facts: Petitioners are owners and operators of plants used for outdoor advertising displays in Washington and Oregon (R. 3, 45, 47). Respondent, Foster & Kleiser Co., is engaged in the same business on a national scale (R. 6-8) and controls ninety per cent of the outdoor advertising in the states comprising the Pacific Coast area (R. 36). The remaining respondents are, Restop Realty Co., a corporation, owned and controlled by Foster & Kleiser Co., and its officers and directors, and various officers, stockholders and employees of the two corporations (R. 8-10).

The outdoor advertising business, as carried on by the parties to the action, is a nationwide business, which in several essential respects depends upon commerce between the states. The advertiser generally contracts with the lithographer (practically all of whom are located in Kentucky, Ohio and Illinois) for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards (R. 17). These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. (R. 27). This bureau contracts with bill posting companies called "plant owners," who control sites for bill boards, for the execution of the contracts secured by the agencies (R. 28-29). Since 1927 certain bill posting companies have been organized into the Out-

door Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America (R. 21). These associations grant to their members a single "franchise" for billboard display in each community where a member plant is located, and direct all advertising which they control to such member plant. The Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs to anyone for display on independent display plant owners' billboards, petitioners being such independents. The Association also refuses to post billboard advertising on the boards belonging to its members for advertisers who permit their advertising to be displayed on billboards belonging to such independent display plant owners (R. 21-26). Foster & Kleiser Co. controls 600 franchises and the General Outdoor Advertising Company, Inc., incorporated in 1924 in furtherance of the conspiracy, controls 1,000 franchises (R. 34). Foster & Kleiser Investment Company, a corporation, whose stock is owned by respondents, George W. Kleiser and Walter P. Foster, purchased 50,000 shares of stock of General Outdoor Advertising Company, Inc., for $1,000,000 and George W. Kleiser became a director of the latter company (R. 32-33). The Outdoor Advertising Association, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. (R. 34-35). The respondent, George W. Kleiser, was a director and for many years president of the Outdoor Advertising Association, Inc. (R. 34). The

petitioners are "independent" operators kept from membership in and the benefits of the Outdoor Advertising Association of America, Inc., by the conspirators (R. 24).

In almost every case the poster advertising contracts, frequently directly solicited by the respondents or petitioners from advertisers located throughout the United States, are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one state to another for the primary purpose of posting or painting them on bill boards or paint panels supplied by the display plants such as petitioners or respondents under the terms of the contracts (R. 4-8).

Respondents intentionally entered into a nation-wide conspiracy, the purposes of which are to monopolize the outdoor advertising business in the Pacific Coast area; to prevent petitioners and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to petitioners and others; and to prevent petitioners and others from securing facilities to furnish an advertising service to advertisers (R. 18-19).

The general plan, scheme and conspiracy is designed and operated to effect such monopoly by:

1. Control of the business of national outdoor advertising at its source through control of the agencies and organizations placing the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the furnishing or sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained, by the plaintiff company and other competitors, by means of various unfair, predatory and illegal acts, which are referred to as local predatory acts, designed to prevent petitioners from securing posters or facilities to furnish an advertising service to advertisers (R. 19-20).

The conspiracy disclosed is substantially identical with that outlined in the opinion in *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, which this Court held to be within the scope of the Sherman Act. The respondents admitted, in their brief below, that the complaint alleges a conspiracy within the *Ramsay* decision (R. 87). The majority opinion apparently recognizes that the *Ramsay* decision would govern this case but for its view that the acts which injured the petitioners' business and prevented the obtaining of contracts or posters were not "done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce" (R. 93).

As a result of the respondents' control over the Outdoor Advertising Association of America, Inc. (R. 21-26) and the National Outdoor Advertising Bu-

reau, Inc. (R. 30-31, 33-34) the conspiracy with General Outdoor Advertising Company and the acts effectuating the conspiracy (R. 32-36, 36-42), practically all national outdoor advertising business in the Pacific Coast Area was and is placed for execution upon the plants of Foster & Kleiser Co., to the exclusion of independent plants, including the petitioners' plants, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was and is thereby monopolized, restricted, curtailed and unreasonably restrained (R. 35-36).

These various acts enabled the respondents to bring about a monopoly greatly damaging petitioners' business. Petitioners are unreasonably restrained in their trade and competition with respondents in the outdoor advertising business, all of which is injurious to petitioners and excludes them from fair competition in such trade and commerce (R. 23, 24, 25, 26, 31, 33-34, 35-36, 41-42). Because of such inability to compete in the trade and commerce, petitioners have been damaged in that their business has been rendered unprofitable and their profits have diminished and they have suffered loss and damage thereby (R. 43-49).

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C.A., Sec. 347 (a)).

2. The date of the judgment of the Circuit Court

of Appeals for the Ninth Circuit herein sought to be reviewed is February 19, 1940.

QUESTIONS PRESENTED

1. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding that, since the main purpose of the conspirators was to secure control of the intrastate aspects of the business, their intent to restrain and their actual restraint of interstate commerce by preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain or execute contracts involving the interstate shipment of the posters and lithographs was not within the scope of the Sherman Act? It held that "the act does not declare unlawful conspiracies to control local trade which may incidentally affect interstate commerce" (R. 95...) even where interference with interstate commerce is deliberately intended and directly produced.

2. Did not the Circuit Court err in holding that the complaint failed to allege with sufficient definiteness and clearness that petitioners by reason of the primary aim of the monopoly were unable to secure posters or lithographs with which to execute their advertising contracts or that advertisers seeking to deal with petitioners were unable to secure posters for posting by petitioners?

3. Did not the Circuit Court err in holding that the outdoor advertising business of the parties hereto, as explained and set forth in the complaint, is not

interstate commerce and that the restraint thereof is not a violation of the Sherman Act?

4. Has not the scope of the Sherman Act been "expanded" so as to cover intrastate activities, such as set forth in the complaint, which "directly affect interstate commerce"? Judge Wilbur holds not. Judge Haney says it has. The point is directly involved in *Apex Hosiery Co. v. Leader*, No. 638, October Term; Certiorari granted February 26, 1940.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Ninth Circuit that the effect on interstate commerce of respondents' monopoly of the outdoor advertising business and its ruinous effect upon petitioners' business were indirect and remote is in plain conflict with the decisions of this Court, holding such monopoly to be a direct restraint and burden upon interstate commerce.

2. The decision of the Circuit Court of Appeals for the Ninth Circuit that, since the main object of the conspiracy is to gain control of intrastate aspects of a business, an intent to restrain and obstruct the aspects of the business involving interstate commerce is not such a primary intent as to bring the case within the scope of the Sherman Act is in plain conflict with decisions of this Court holding such an intent to be within the scope of the Sherman Act.

3. *Foster & Kleiser Co. v. Special Site Sign Co.*

(9th Cir.) 85 F. (2d) 742, is not controlling under the different facts of the instant case.

4. The outdoor advertising business, as explained and set forth in the complaint, substantially involves interstate commerce, and a conspiracy to restrain or monopolize it is within the scope of the Sherman Act.

5. The instant case is within the Sherman Act since the scope of that act has been extended by the several decisions of this Court which hold that Congressional power over commerce extends to cover not only interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

6. The Circuit Court of Appeals for the Ninth Circuit has decided a question of national importance in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court for the Ninth Circuit, commanding that Court to certify and send to this Court on the date to be designated in said Writ, full and complete transcript of record of all proceedings in this case numbered and titled on its docket "No. 9215, September Term, 1939, *C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, Appellants, v. Foster & Kleiser Co., a corporation, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., Albert Mortenson, Gilman Haynes, Restop Realty Co., a corporation, Gerald O'Neil, Lyle Abrahamson, Paul Dueber, Walter Stevens and George Smith, Appellees,*" to the end that said case may be reviewed

and determined by this Court as provided by law and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

Dated Seattle, Washington, March 25, 1940.

C. E. STEVENS COMPANY,
C. E. STEVENS TACOMA COMPANY,
C. E. STEVENS COMPANY OF OREGON,
By H. B. Jones,
Attorney for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The ruling of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to the second amended complaint without leave to amend was filed April 26, 1939, and has not been officially reported. It appears in the record at page 54.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed February 19, 1940, and has not been officially reported. It appears at the end of the record (R. 81).

For the sake of brevity we refer to the preceding petition for the following:

JURISDICTION . . . . . (*supra*, page 7); and,

STATEMENT OF THE CASE (*supra*, pages 1-7).

ASSIGNMENTS OF ERROR

I. The Circuit Court of Appeals erred in holding that since the main object of the conspiracy is to gain control of intrastate activities of the outdoor advertising business, the intent to accomplish that purpose by restraint upon and actual restraint of interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (9th Cir.) 85 F. (2d) 742, is not controlling because the facts of the instant case are substantially different from those of the reported case. The Circuit Court erred in holding it was controlling.

III. The outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

IV. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

ARGUMENT

I. The Circuit Court of Appeals Erred in Holding That Since the Main Object of the Conspiracy is to Gain Control of Intrastate Aspects of the Outdoor Advertising Business, the Intent to Accomplish That Purpose by Restraint Upon and Actual Restraint of Interstate Commerce Through Preventing Posters and Lithographs From Other States Reaching Petitioners or by so Crippling Petitioners' Business Facilities as to Destroy Their Ability to Obtain and Execute Contracts Involving the Interstate Shipment of Posters and Lithographs Is Not Within the Scope of the Sherman Act.

In affirming the judgment entered by the District Court the Circuit Court of Appeals stated (R. 92):

> "In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, *supra*, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the con-

trol of the local business of securing advertising contracts and billposting."[1]

The quoted holding of the Circuit Court is in error for three reasons.

---

[1]The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209).

"Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731)."

A. The first is that the Court ignores the distinction between Sections 1 and 2 of the Sherman Act. Under Section 1 the conspiracy and the resulting restraint upon interstate commerce are sufficient. The intent actuating the conspiracy is immaterial. It is only under Section 2 that the intent of the conspirators in monopolizing or attempting to monopolize the interstate commerce becomes material. The rule is succinctly stated by Judge Haney in the instant case at page 17 of the dissenting opinion:

> "If, by necessary operation of the conspiracy, there is an actual restraint the statute is violated, the actual intent being immaterial." (R. 106).
>
> *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49;
>
> *Paramount Famous Corp. v. United States*, 282 U. S. 30, 49.

Admittedly (R. 90) the complaint pleads a violation of Section 1 by conspiracy to restrict national outdoor advertising in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly movements of posters, lithographs, stencils and other physical paraphernalia connected therewith. It is not necessary to *stop* the interstate movement to give rise to a liability; it is sufficient that it is *diverted or restricted* to certain desired channels, which was the purpose of this conspiracy.

> *Ramsay Co. v. Associated Billposters*, 260 U. S. 501; 43 S. Ct. 167, 67 L. ed. 368.

Judge Wilbur holds that, while the complaint does state a conspiracy to restrain interstate commerce, such restraint was not the primary object of the con-

spiracy. Therefore any injury to petitioners is not compensable under the Sherman Act because it results from a primary aim to monopolize the intrastate aspects of the business (R. 90). In considering this point it is important to remember that it is not essential that either the plaintiff's business which is damaged or the business of the defendants constitute interstate commerce.

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
>
> *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> *Schechter v. United States*, 295 U. S. 495, at 544.

It is also important to remember that wherever the terms "independents", "independent plant owners", "independent plants" and "independent companies" are found in the complaint they include and are intended to embrace the appropriate petitioner (R. 19).

Illustrating that the complaint does clearly and definitely plead the existence of the conspiracy to

monopolize the business by restraint upon interstate commerce and the resultant restraint and injury to petitioners' business, we call attention to some of the allegations. Respondents, through the Outdoor Advertising Association of America, Inc. (hereinafter called the Association), and its predecessors, which they controlled by means of their agreement with General Outdoor Advertising Company (hereinafter called the General Company) (R. 32-34), intending to prevent petitioners obtaining posters from other states, refused to post lithographs if the lithographers sold lithographs to petitioners. This refusal successfully intimidated and coerced the lithographers. As a result the free movement in interstate commerce of the posters, lithographs, printed designs, and contracts for outdoor advertising were monopolized and unreasonably restrained, and petitioners were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, and competition was lessened (R. 23, 25-26). In the same manner advertisers were forced to deal with respondents and not with petitioners (R. 23-26, 36). An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them. Every effort of the respondents through the Association (R. 21-26), the National Outdoor Advertising Bureau (R. 26-29, 30-31, 33-36), the community of interest and actual physical and financial contact with the General Company (R. 32-36) and the so-called local predatory acts (R. 36-42) was directed

toward accomplishing a monopoly of the outdoor advertising business in the Pacific Coast area by directly preventing posters and lithographs being shipped from other states to petitioners or by so crippling petitioners' business and facilities that no one would want to ship posters and lithographs to them because they would be unable to render proper and adequate service.

By burdening and restraining interstate commerce these efforts did accomplish the monopoly just as the respondents planned and they control over ninety per cent of the business in the Pacific Coast area. This monopoly was effected because, as planned, the interstate commerce in posters was burdened and restrained (R. 23, 26, 29, 31, 34, 35-36, 37-42, 42-44).

The conspiracy and the acts furthering it did "work to the damage of" petitioners (R. 44, 45, 46-47, 48).

Judge Haney concurred in the opinion in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, which held there was no direct causal connection between the acts of the conspirators and the injury complained of. The majority treats that case as controlling here. In considering whether the direct causal connection between the acts of the conspirators and the injurious effect upon petitioners is alleged in this complaint, Judge Haney states:

> "The majority, in my opinion, has confused the 'purpose' of the conspiracy with the means used to 'accomplish' it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial. 'It is the effect upon commerce, not the

source of the injury, which is the criterion.' Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.

"The complaint contains many allegations that the accomplishment of the conspiracy 'obstructed and hindered' appellants in their business; and that 'the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.' It was also alleged that 'in almost every case' the poster advertising contracts were 'agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state.' It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of *Santa Cruz Co. v. Labor Board, supra*, and *Edison Co. v. Labor Board*, 305 U. S. 197, 221, I think it inevitably follows that the effect was 'direct'." (R. 108.)

B. The second reason why the quoted holding is in error is that it is based upon an incomplete analysis of the conspiracy and the means adopted to accomplish it. It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another.

To control this interstate shipment they entered into a nation-wide agreement with the other two powerful combines in the business. Through purchasing stock in the General Company and electing the respondent, George W. Kleiser, to the board of that company (R. 32-33) respondents assumed a position where it was easy for them to obstruct and hinder the interstate shipment of the posters and lithographs by applying pressure on lithographers in the Middle West and on advertisers all over the country. In view of such a complex and successful plan operating throughout the United States respondents cannot maintain that their conspiracy was limited in its application to the intrastate aspects of the outdoor advertising business.

C. The third and most important error in the quoted passage is in confusing the means used by the conspirators with their ultimate ends. This is apparent from the majority's use of the word "intent" as the equivalent of the word "purpose" or "object." The ultimate "purpose" or "object" of the conspirators in all cases involving violations of the Sherman Act, is to benefit themselves materially by unreasonably limiting competition and thus acquiring the power unreasonably to fix prices, a matter which may be primarily local (R. 164). In that sense the ultimate purpose or object in the *Stevens* case is the same as it was in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368. However, an examination of the cases cited by the majority in support of its holding (R. 90-93) discloses that the intent with which the restraint upon inter-

state commerce is effected is not to be confused with the ultimate purpose of the conspirators.

In *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, the conspirators were not only billposters, as in the instant case, but the association they formed to assist in the accomplishment of their conspiracy was a predecessor of the Association in this case (R. 21) and was created for like purposes. They combined and conspired to monopolize the outdoor advertising business in their respective localities and to dominate and control all trade and commerce in posters within such limits. Thus, as in the instant case, their main object or purpose was to monopolize the outdoor advertising business. They *intended* to bring this about by dominating and controlling the interstate trade in posters. Thus in the *Ramsay* case and in this, the Stevens complaint, the intent to accomplish the monopoly by restraining interstate commerce is the same. To carry out the conspiracy the Associated Billposters adopted the same restraints and burdens upon the interstate trade, as such, and upon their competitors. Plaintiffs, in the *Ramsay* case, like petitioners here (R. 4, 15-17) solicited outdoor advertising contracts and prepared, designed, purchased and displayed lithographs and posters. As a result of the conspiracy plaintiffs were prevented from competing in the markets, and their business was restricted and unprofitable. In discussing the case this Court said at page 511 of the decision:

> "The court below held: 'The business of the solicitors is to send their customers advertise-

ments to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'

"*We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiff, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and plaintiff's business has suffered." (Emphasis supplied)

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 511, 43 S. Ct. 167, 67 L. ed. 368, 370.

In *Bedford Cut Stone Co. v. Journeymen S. C. Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916, the company had ceased to operate a closed shop and employ the union's members, all stonecutters. The union called a national strike directing all of its members to refuse to work on any job where the stone had been quarried or worked upon by non-union men. The resultant walk-offs affected building operations purely local in character. The union raised the argument that its primary purpose was to unionize the cutters and carvers at the quarry. This Court held:

> "Respondents' chief contention is that 'their sole and only purpose * * * was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioner's product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A restraining of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they

might have been at liberty to pursue by means not involving such restraint."

Bedford Cut Stone Co. v. Journeymen S. C. Assoc., 274 U. S. 37, 47, 47 S. Ct. 522, 71 L. ed. 916, 921.

In the second *United Mine Workers* case (*United Mine Workers v. Coronado Coal Co.*, 268 U. S. 295, 69 L. ed. 963, 45 S. Ct. 551) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an *intent* to accomplish this ultimate purpose by restraining interstate commerce. In discussing the question this Court said:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act.*" (Emphasis supplied)

United Mine Workers v. Coronado Coal Co., 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551.

The majority opinion in the Circuit Court of Appeals also calls attention to *Local 167, I. B. T. etc. v. United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396. Marketmen, who acted as wholesalers of the continuous stream of live poultry pouring into New York, purchased the poultry and sold it to retailers

after interstate transit had ceased. They organized a Chamber of Commerce with the ultimate purpose of monopolizing the business and increasing prices. They engaged in many acts to control the handling, the sales and the price of the poultry. They denied that they intended to restrain or did interfere with interstate commerce. In approving the granting of the injunction this Court held:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. * * * But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * * The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. * * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and move-

ment of the poultry while unquestionably it is in interstate commerce."

Local 167, I. B. T., etc. v. United States, 291 U. S. 293, 297, 78 L. ed. 804, 808, 54 S. Ct. 396.

An allegation of the purpose or intent with which an act or series of acts is done is an allegation of fact good upon demurrer. 49 C. J. p. 57, par. 51. Intent may be averred generally. Federal Rules of Civil Procedure, Rule 9 (b).

This analysis of the cases cited by the majority opinion as authority for the quoted passage (*supra* 14) indicates that in each case, as here, while the *ultimate purpose or object* was to monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And, in each case, the presence of this intent was the element which brought the case within the scope of the Sherman Act. The majority has failed to distinguish between ultimate ulterior purpose and the intent to accomplish such purpose by a restraint upon interstate commerce forbidden by the Sherman Act.

Therefore, it is respectfully submitted that the Circuit Court of Appeals erred in holding that since the ultimate purpose of the conspiracy is to gain control of the intrastate aspects of the outdoor advertising business, the intent to accomplish that purpose by means of restraint upon interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their

ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (9th Cir.) 85 F. (2d) 742, Is Not Controlling Because the Facts of the Instant Case Are Substantially Different From Those of the Reported Case.

This Court has held that in the determination of whether or not a particular case falls within the purview of the Sherman Act, each case must be considered on its own facts.

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts."
>
> *Sugar Institute v. United States*, 297 U. S. 563, 600, 80 L. ed. 859, 876, 56 S. Ct. 629.

The essence of the *Special Site* decision seems to be this: Bill posting, *as alleged in the complaint*, is local in character. Shipments made by the defendant from itself in one state to itself in another state of materials used in bill posting cannot be the subject of a conspiracy to restrict interstate commerce. The defendant could not conspire with itself. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). There were no allegations that the defendant had anything whatever to do with the shipment of posters or their movement in interstate commerce. The transportation of the necessary posters and lithographs in interstate commerce was not alleged to be related to

or involved in any way in the defendant's bill posting business. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). The parties and activities in that case were substantially confined to the State of California. The theory of the *Special Site* complaint was that if the parties locally displayed posters or lithographs which had been the subject of interstate transportation and the defendant committed local acts of depredation tending to interfere with plaintiff's local display, such acts and interferences, through the resulting effect upon interstate commerce, constituted a violation of the Sherman Act. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750). In holding that this theory was erroneous, the court pointed out that the interference with interstate commerce, which is subject to the act, must be direct and not merely an indirect resulting effect. The court was of the opinion that since there were no allegations that defendant had conspired with another to directly restrain transportation between one state and another, or was monopolizing the business so as to produce that direct effect, the local acts of depredation complained of were not violative of the Sherman Act, and that interstate commerce was not involved simply because posters or other materials were shipped between states by parties with whom the defendant had no relation.

> "In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-Trust Act."
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 754.

In that case the means alleged to have been used to restrain interstate commerce, consisting primarily of local acts of a competitive nature between parties who were residents of the same state, were, the Court said, "adopted to the injury or destruction of the plaintiffs' business in its intrastate aspects," and none of them "are *alleged* to have directly affected the interstate trade in posters or lithographs" (Emphasis supplied).

The situation thus disclosed by the *Special Site* decision is far from similar to the nationwide conspiracy factually alleged in the *Stevens* complaint. Respondents are engaged in business on a national scale (R. 6-8) actively preparing, designing, purchasing and displaying posters and lithographs (R. 15-17). They enter into thousands of contracts actuating the interstate shipment of the posters and lithographs for display upon billboards controlled by them in several states, and in many cases for display upon designated boards (R. 11-12). Respondents entered into and are carrying out a conspiracy to monopolize the outdoor advertising business and this monopoly is intended to be effected by restraint upon the interstate commerce in posters and lithographs in two respects. The first is to restrain such commerce by utilizing the Association, the Bureau, and the "tie-ups" with the General Company to force lithographers and advertisers to cease sending posters and lithographs to petitioners in the states in which they do business and to send those posters and lithographs to respondents (R. 20, 21-26, 29, 32-36). The second is to institute a series of so-called local predatory acts which

will so cripple petitioners' business facilities as to destroy their ability to procure and execute contracts involving interstate shipment of the posters and lithographs so that advertisers will deal only with respondents (R. 18-20, 36-42). These efforts to accomplish the monopoly by restraining interstate commerce are entirely successful as planned by the conspirators. They now control over 90% of the outdoor advertising business in the Pacific Coast area (R. 23, 26, 29, 31, 34, 35-36, 37-42, 42-44).

It is, therefore, respectfully submitted that the Circuit Court erred in holding that *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, in any sense controls the instant case.

The action of this Court in denying certiorari in *Special Site Sign Company v. Foster & Kleiser Company*, 299 U. S. 613, 81 L. ed. 452, 57 S. Ct. 315, should not be regarded as significant both because of the oft-repeated admonitions of this Court to this effect and also because the order of the Circuit Court of Appeals in that case was not a final one but remanded the case with leave to amend and for further proceedings.

III. The Outdoor Advertising Business, as Factually Explained and Set Forth in the Second Amended Complaint, Substantially Involves Interstate Commerce, and a Conspiracy to Restrain or Monopolize It Directly Restrains and Monopolizes Interstate Commerce and is Within the Scope of the Sherman Act.

In a footnote to the opinion (R. 86) the court says:

> "Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. *Ware and Leland v. Mobile County*, 209 U. S. 405; *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436; *Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91." (*Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916).

Strictly speaking petitioners admit that this statement is true so far as it goes. However the cases cited are inapplicable to the situation now before this Court. In none of those cases did the court decide that a nation-wide business of preparing, designing, purchasing and displaying posters and lithographs in the course of which thousands of contracts arose *actuating* the interstate shipment of these posters and lithographs for display on specified billboards was an *intrastate* business not substantially involving interstate commerce. The only cited case which concerned the application of the Sherman Act is *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436. Only Section 2 of the Act was involved (See *supra*, page 15, for distinction between Sections 1 and 2).

In that case this Court held that the advertising contracts which the plaintiff advertising agent offered the defendant publisher and which the latter refused to accept had no direct relation to the circulation of the magazines in interstate commerce. That ruling is inapplicable here for the reasons previously stated (*supra*, page 28).

Further, the *Special Site* case rests its ruling that the billposting business is not interstate in character upon this Court's ruling in *Packer Corp. v. State of Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643. The latter case involved a state statute prohibiting the posting of tobacco advertising in Utah. It was aimed at the use of the poster *after* it was affixed to the billboard. No facts appeared in that case to support a finding that the defendant was engaged in a business substantially involving interstate commerce, or that its nationwide illegal combinations had made it substantially interstate in character. These allegations are present in the Stevens complaint. Consequently, the *Packer* decision is inapplicable to this case. It does not generally and finally determine that every outdoor advertising business is strictly intrastate in character.

Therefore, it is respectfully submitted that the Circuit Court erred in not holding that the outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce. It is obvious that since it does substantially involve interstate commerce the restraint upon and monopolization of it are within the scope of the Sherman Act.

IV. The Instant Case is Within the Sherman Act Since the Scope of That Act Has Been Extended by the Several Decisions of This Court Which Hold That Congressional Power Over Commerce Extends to Cover Not Only Interstate Commerce, as Such, But Intrastate Activities Which "Directly" Affect Such Commerce.

The congressional power over commerce is governed by the Constitution, Art. 1, Sec. 8. Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U.S.C.A. §151 *et seq.*), the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U.S.C.A. §601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U.S.C.A. §511 to 511q). The scope of each of these acts has been passed upon by this Court.

National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. ed. 1014;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

This Court in the first cited case announced what has come to be known as the expanded concept of interstate commerce in the following words:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement;' * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, 223 U. S. 51, 56 L. ed. 345, 32 S. Ct. 169.
>
> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."
>
> *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 37, 57 S. Ct. 615, 81 L. ed. 893, 911.
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> * * * * * *
>
> "It is thus apparent that the fact that the em-

ployees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 40, 81 L. ed. 913.

* * * * * *

"* * * In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. *When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?* We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." (Emphasis supplied) 301 U. S. 41, 81 L. ed. 914.

Where local transactions are so inextricably

mingled with and directly affect the admitted interstate transactions they, too, are subject to Federal authority. The local transactions are caught up in the current of interstate commerce or their manipulation is capable of directly affecting, burdening and obstructing the interstate commerce and thus they become subject to Federal regulation. This view is further expressed in the following cases:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, ... U. S. ...., 60 S. Ct. 107, 84 L. ed. 86;

Edwards v. United States, 91 F. (2d) 767;

United States v. Wilshire, 9 F. Supp. 396, aff. 77 F. (2d) 1022.

This court has indicated in *Interstate Circuit, Inc., et al. v. U. S.*, ... U. S. ....., 59 S. Ct. 467, 83 L. ed. 444, that, in circumstances strikingly similar to those in the instant case, the theory of the expanded application of Congressional power over commerce applies in cases involving violations of the Sherman Act.

Under the foregoing decisions of this Court, even if respondents' business and the acts they engaged in to further their conspiracy are intrastate in character, their activities did have a direct effect upon the interstate trade in posters and lithographs. In view of this direct restraint upon that commerce their illegal intent (which has never been denied by respondents) will be presumed. The injury they have caused peti-

tioners' business is thus compensable under the Sherman Act.

As in *Apex Hosiery Co. v. Leader*, No. 638, October Term, before this Court on certiorari granted February 26, 1940, the Circuit Court in the instant case failed to follow the express ruling of this Court in the foregoing cases on the ground that the term "affecting commerce" has a broader connotation than the term "in restraint of trade or commerce among the several States." Its view was:

> "* * * The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of Congress to exercise control over activities which separately considered are intrastate but which, because of their close and substantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law. As we have stated, the Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the *primary* purpose of monopolizing or restraining commerce among the sev-

eral states, are not covered by such laws although such activities might incidentally affect interstate commerce." (R. 94) (Emphasis supplied)

Such a holding ignores firstly the fact that all the legislation under discussion is based upon the same constitutional provision and each act seeks to protect the same kind of commerce. There should be no differentiation between the different degrees of that commerce each does protect. Secondly, it ignores the definition of the term "affecting commerce" as including "burdening or obstructing commerce," which has always been considered by this Court as synonymous with "restraining commerce." Finally it ignores the above-cited decisions of this Court that, irrespective of the terms used in the particular statutes, the intrastate acts complained of had a direct effect upon interstate commerce, even though those acts, separately considered, were local in character.

It is therefore respectfully submitted that the Circuit Court erred in not holding that the application of Congressional power over commerce, insofar as the Sherman Act is concerned, has been extended by the recent decisions of this Court to cover not only interstate commerce, as such, but the intrastate activities of these respondents which directly affect such commerce.

CONCLUSION

In conclusion it is respectfully submitted that this case is one particularly appropriate for review by this Court, since:

(A) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in posters and lithographs.

(B) As a result of respondents' conspiracy and acts in furtherance thereof, there was a direct restraint upon interstate commerce, whether that commerce be the trade in posters and lithographs or the outdoor advertising business itself, because such business substantially involves interstate commerce.

(C) The Sherman Act has been extended by the decisions of this Court which hold that Congressional power to protect commerce extends to cover not only interstate commerce, as such, but the intrastate activities of respondents herein which directly affect such interstate commerce.

(D) The present decision is in plain conflict with the uniform decisions of this Court and of other Circuit Courts of Appeals.

(E) The question whether respondents' restraint and obstruction of interstate commerce as alleged in the second amended complaint constitutes a violation of the Sherman Act is one of national importance to business and the public interest.

Respectfully submitted,

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